Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08977/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 July 2014	**On 14 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MR ANDREW ANTHONY HEADMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Halstead of Counsel
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica born on 21 December 1973. He appealed against the respondent's decision dated 12 March 2013 to remove him from the United Kingdom. The appellant came to the United Kingdom on 15 September 2001 as a visitor and overstayed. He made application for leave to remain but not until December 2012. The application was made on the basis of the appellant's marriage

and family here. That application was refused under Appendix FM with reference to EX.1 and paragraph 276ADE. The appellant's appeal against the respondent's refusal was allowed by Judge Norton-Taylor (the judge) in a determination promulgated on 20 January 2014. The Secretary of State claimed the judge erred in law by applying EX.1 as a stand alone provision. The consideration of the appellant's Article 8 rights fell within Appendix FM, but EX.1 of that appendix supplemented the provisions of the Rules. The respondent claimed that EX.1 did not form an independent basis for an appeal to succeed, it merely provided that where EX.1 was met, other criteria (for example the financial or maintenance requirements) could be disregarded. After a hearing on 29 April 2014, I found that the judge erred in allowing the appeal under paragraph EX.1 of Appendix FM as the guidance in **Sabir (Appendix FM – EX.1 not freestanding) [2014] UKUT 63 (IAC)** held that paragraph EX.1 was not freestanding.

2. Thus the matter came before me to be re-made. Mr Avery confirmed that there were no issues arising from the facts found by the judge although he argued that the strength of the appellant's relationship with his son aged 12 (T) had been misrepresented, which I will consider. The evidence is contained in the appellant's bundle including his statements, statement of his wife, statement of Tracie-Ann Cowell, statement of T and letters of support from Harold Anderson, Reverend Lewinson, Jerry McGrath and Mrs Headman's Nottingham relatives, Marcia Pryce, Kumari Golding and Mrs M Blair. In addition, I heard oral evidence from the appellant, Mrs Headman and Ms Cowell. I will summarise the evidence as necessary in the course of explaining the reasons for my decision. I have considered each item of evidence and have reviewed that evidence in the round. The fact that I have not specifically referred to any particular piece of evidence in my determination does not mean that the evidence has not been considered in the manner I have described.

3. Mr Avery made submissions on behalf of the respondent and Mr Halstead on behalf of the appellant. I have made a note of their submissions in my Record of Proceedings and have taken them into consideration.

Findings and Conclusions

4. In this appeal the burden lies with the appellant to prove the facts and matters he relies upon. His case was advanced on the basis that because his particular circumstances are not covered by the Rules, then those circumstances are compelling and/or extraordinary such that I should go on to consider Article 8 in terms of the proportionality of the respondent's decision. The standard of proof is that of a balance of probabilities. (See the determination in **EH (Iraq) [2005] UKIAT 00065**.)

5. To make a decision regarding the appellant's particular circumstances, it is instructive to set out the development of Article 8 case law in **MF** in the Upper Tribunal and the Court of Appeal. **MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)** found that the new Immigration Rules were not a "complete code" when it came to Article 8 claims as decisions still had to be compliant with Section 6 of the Human Rights Act 1998 [25]. The assessment remained in two stages, first the

application of the Rules and second, the application of Article 8 [32]–[41]. In one important respect, the new Rules affected the second stage Article 8 assessment because they gave greater specificity to which circumstances attracted the greatest weight in the public interest. The degree to which the new Rules changed the interpretation of the public interest should not be exaggerated. Previous case law held that the proportionality assessment did not treat the public interest as immutable such that the Upper Tribunal found that in most cases, the new Rules established an "exceptionality threshold" for the public interest to be outweighed [42]–[45].

6. **MF (Nigeria) [2013] EWCA Civ 1192** held it was not in dispute that the case law provided that an appeal in a removal or deportation case involved two stages. First, to assess whether the decision appealed against was in accordance with the Immigration Rules and second, to determine whether the decision was contrary to the appellant's Article 8 rights [7]. The Court of Appeal found that the picture that had emerged from the Secretary of State as to what was meant by "exceptional circumstances" under paragraph 398 was "by no means entirely clear" [15]. In **Izuazu (Article 8 – new Rules) [2013] UKUT 00045** the Secretary of State argued that the new Rules restored the "exceptional circumstances" test that was disapproved by the House of Lords in **Huang** but the Court of Appeal found that was a surprising submission bearing in mind that the House of Lords had rejected the exceptionality test [31] – [32].

7. The Rules are a detailed expression of government policy on controlling immigration and protecting the public and the Article 8 sections reflect the Secretary of State's view as to where the balance lies between the individual's rights and the public interest. The judge must consider proportionality in the light of that expression of public policy. Various cases have confirmed this approach **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)**, **Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC)** in particular headnote (vi):

> *"(vi) Where an area of the rules does not have such an express mechanism, the approach in **R (Nagre) v Secretary of State for the Home Department** **[2013] EWHC 720 (Admin)** ([29]-[31] in particular) and **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** should be followed: i.e. after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."*

8. **Iftikhar Ahmed v Secretary of State for the Home Department [2014] EWHC 300 (Admin)** held it is settled law that considerations under Article 8 are embedded in the Immigration Rules such that if the Secretary of State applied those Rules then, ordinarily, Article 8 considerations would have been fully catered for. In that case, no good arguable grounds had been advanced that there had been factors particular to the claimant that had not been capable of being assessed from within the existing framework of Rules and which therefore needed to be assessed outside of the Rules.

Further the Secretary of State had taken into account all of the factors and matters which had been relevant to the claimant. Finally, there had been no error of law in the approach adopted by the Secretary of State to the question of whether there had been insurmountable obstacles to relocation.

9. What Mr Halstead says is that the appellant's circumstances can be distinguished from those in **Iftikhar Ahmed**. That is because the Rules fail to envisage a situation where the appellant is in a marital relationship with a British citizen and separately, has a genuine caring role in the upbringing of his child, albeit that both the child and his mother, the appellant's ex-partner, are Jamaican nationals, with leave to remain here only until 2015.

10. The view of the respondent was that the appellant was not in a genuine and subsisting parental relationship with T. Further, there were no insurmountable obstacles to family life with Mrs Headman continuing outside of the United Kingdom and particularly so because she was originally from Jamaica and she had holidayed there in 2009. The appellant had come to the United Kingdom in 2001 as a visitor and only made application to remain in 2012. It was not accepted that he had lost ties to his own country.

11. Mr Avery did not take issue with the appellant's genuine marital relationship and parental relationship with T which was disputed in the reasons for refusal. In such circumstances, I find that is a situation not recognised under the Rules. See **Nagre** at [28] – [29]:

> *"As appears from the new guidance issued by the Secretary of State in relation to exercise of her residual discretion to grant leave to remain outside the Rules, as set out above, and as Mr Peckover makes clear in his witness statement, the new rules contemplate that there will be some cases in which a right to remain based on Article 8 can be established, even though falling outside the new rules. Therefore, the basic framework of analysis contemplated by Lord Bingham in Huang continues to apply, as was recognised by the Upper Tribunal in Izuazu.*
>
> *Nonetheless, the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave."*

12. I find as regards this particular appellant's circumstances that there are arguably compelling circumstances not sufficiently recognised under the Rules as envisaged in **Nagre**. I proceed to consider what Mr Avery referred to as the stand alone stage of Article 8 considerations.

13. Article 8 of ECHR states:

(i) Everyone has the right to respect for his private and family life, his home and his correspondence.

(ii) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

14. In **Razgar [2004] UKHL 27** Lord Bingham gave guidance at paragraph 17 as to the correct approach when dealing with Article 8 as follows:

> "In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must consider:
>
> (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?
>
> (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (iii) If so, is such interference in accordance with the law?
>
> (iv) If so, is such interference necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, or the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

15. **LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC)** provided that the best interests of children have to be a primary consideration, meaning that they have to be considered first. Broadly speaking, the best interests of the child mean the wellbeing of the child. **ZH (Tanzania) [2011] UKSC 4** provided that the over-arching issue is the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents and in what circumstances it is permissible to do so where the effect will be that a child who is a British citizen will also have to leave. See also **Omotunde (Best Interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 00247 (IAC)**. There is no substantial difference between a human rights based assessment of proportionality of any interference considered in **ZH** and the approach required by community law in **Zambrano [2011] EUECJ Case C-34/09 OJ 2011 C130-2**. In this particular context the Article 8 assessment questions set out in **Razgar** should be tailored as follows, placing the assessment of necessity where it most appropriately belongs in the final question dependent on the outcome of proportionality and a fair balance, rather than as part of the identification of the legitimate aim:

(a) Is there family life enjoyed between the appellant and a minor child that requires respect in the context of immigration decision making?

(b) Would deportation of the parent interfere with the enjoyment of that family life?

(c) Is such an interference in accordance with the law?

(d) Is such an interference in pursuit of a legitimate aim?

(e) Is deportation necessary, proportionate and a fair balance between the rights to respect for the family life of the appellant and the child and the particular public interest in question?

16. **E-A (Article 8 – Best Interests of Child) Nigeria [2011] UKUT 00315 (IAC)** Mr Justice Blake and SIJ Jarvis said:

> "(i) The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.
>
> (ii) Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.
>
> (iii) During a child's very early years, he or she will be primarily focused on self and the caring parents or guardians. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well being.
>
> (iv) Those who have their families with them during a period of study in the UK must do so in the light of the expectation of return.
>
> (v) The Supreme Court in **ZH (Tanzania)** was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own."

17. See the headnote in **Azimi-Moayed and Others (Decisions Affecting Children; Onward Appeals) [2013] UKUT 00197 (IAC):**

"**Decisions affecting children**

(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

18. In **VW [2009] EWCA Civ 5** the Court of Appeal held that in assessing proportionality and whether an appellant's family should return to his country of origin with him, the test is not whether there are insurmountable obstacles to prevent their going but whether it is reasonable to expect them to go. If there are insurmountable obstacles, they will succeed but if there are not, they will not necessarily fail.

19. I found all witnesses straightforward and credible. I have no reason to doubt their integrity or the truth of what they told me. Although Mr Avery sought to establish that the appellant's relationship with T had been exaggerated for my benefit, I do not find that to be the case. There was in my view, nothing that emerged from the evidence to support that proposition.

20. As I have said above, the facts were not in dispute. The appellant came here in 2001 with entry clearance as a visitor and then overstayed for eleven years before making application for leave to remain. The appellant has a poor immigration history although there was no evidence of any criminal offending. The application was made on the basis of the appellant's marriage to Lorraine Headman, a British citizen born on 1 April 1964. The marriage took place in August 2010. Mrs Headman works as a healthcare assistant with children and young people with eating disorders, having previously worked with the elderly. She earns £19,000 to £20,000 a year or thereabouts. Mrs Headman has her mother and stepfather, an adult daughter and two grandchildren all living in the Nottingham area. She came here in 1987. She has no property nor close relatives in Jamaica.

21. T was born in the United Kingdom on 20 May 2002. T is now 12. His mother is Ms Cowell, the appellant's former partner with whom he cohabited for eight years or thereabouts until the couple separated in 2008.

22. I accept that the appellant has always been involved in T's care, upbringing and development and from 2008, when the couple separated, the appellant has had regular contact with T. Mrs Headman and Ms Cowell told me that they have been able to put their understandable differences on one side in the best interests of T and the ongoing relationship with the appellant. T stays with the Headmans every alternative weekend from a Saturday lunchtime until a Sunday evening, taking part in family activities and spending time with his Dad. He is doing well at school and is interested in sporting activities which the appellant supports. Recently, T has been spending additional separate days with his Dad over and above the weekend contact. Ms Cowell sees the appellant's involvement in T's life as positive. She described him to me as a responsible, caring father. As T's mother, she recognises the appellant's important input to T's life. Most important, Ms Cowell acknowledges how valued the appellant is by T. I find the appellant has always had a genuine sustained relationship with T. It may be that there was a hiccup in contact when the appellant got together with Mrs Headman, however, I found both women adopted a mature approach with regard to their family circumstances and what they both considered to be T's essential nurturing from his father.

23. I find it is in T's best interests that his relationship with the appellant should be allowed to continue and develop. I find given the loving relationship that exists between them and has existed since T was born, the impact upon T of his father being removed to Jamaica cannot be underestimated. I find the separation would be likely to have a devastating effect upon his best interests, in particular, his emotional well being, education and social development. He would be without the important male role model the appellant has consistently provided. In reaching that conclusion I accept that Ms Cowell has a partner and the appellant himself frankly acknowledged that, inevitably, a man who forms a life with a woman with a child will inevitably influence that child's life. Having said that, the appellant is T's primary male focus and particularly because Ms Cowell's partner does not live with her.

24. I bear in mind that T also has contact with Mrs Headman's relatives in Nottingham. He last visited in August or September 2013. The appellant thought they saw each other two to three times a year. T is the same age as one of Mrs Headman's grandchildren and they get on well when they meet. It was not suggested that in the event of the appellant's removal, T would no longer have contact either with Mrs Headman or the Nottingham relatives but I find that to be likely; the appellant is the link in these relationships.

25. Mr Headman has three brothers in the United Kingdom with whom he is in regular contact. The three brothers are known to T and he sees them when he is with his Dad. I find the contact to be important in T's best interests in terms of his sense of identify and family.

26. I take into account that none of the witnesses have close relatives in Jamaica, nor property there to which they could return; Mr Avery did not challenge their evidence in that regard. If the appellant was returned there he would be initially at least, without a home or employment. The appellant's relationship with Ms Cowell began in Jamaica before they both came to the United Kingdom. Whilst Mrs Headman visited with other members of her family for a holiday in 2009, she has no close family members there. There was no suggestion of either Mrs Headman or Ms Cowell and T returning to Jamaica, although what will happen in 2015 when their leave comes to an end is yet to be decided; there was no evidence before me in that regard. T has known no other life other than the United Kingdom; he was born here. In the event that the appellant was removed to Jamaica, there would be long distance contact and the prospect of only infrequent visits.

27. This is a stable family, notwithstanding that it has been built and developed upon the appellant's unlawful presence here. Leaving aside the respondent's duty to maintain immigration control and the appellant's unlawful presence, there was no suggestion by Mr Avery that there are any public policy issues requiring his removal. Of course, the appellant has lived the majority of his life in his own country but in my view, the status quo should be protected, in particular because of the appellant's relationship with T. That is not to minimise the impact upon Mrs Headman in terms of **Beoku-Betts [2008] UKHL 39**. The couple were very frank that Mrs Headman had been aware of the appellant's lack of status here from the outset of their relationship. The appellant's return to Jamaica would sever the domestic circumstances that have developed since the couple met and married. Mrs Headman did not suggest that she would feel able to return to Jamaica with the appellant. Her parents, child and grandchildren all live here. She has employment here.

28. Taking into account all that I have set out above and considering those circumstances in light of **VW [2009] EWCA Civ 5**, I do not find it reasonable to expect the appellant to be returned to Jamaica.

Conclusion

29. I accept that removing the appellant would interfere with his right to respect to family and private life of such gravity as to potentially engage Article 8. Of course,

such interference would be in accordance with the law in the interests of maintaining immigration control. The issue for me must be the proportionality of the respondent's decision, particularly insofar as the refusal bears upon the circumstances of T. For all of the reasons I have set out, I find that, looking at the situation in the round, the respondent's decision is disproportionate. I make that finding bearing in mind the fact that the appellant has remained here unlawfully. Nevertheless, I make my finding respecting the balance between the public interest and family and private rights and concluding that the appellant's circumstances are such on these particular facts to demand an outcome in his favour.

30. I re-make the decision by allowing the appeal.

Decision

31. Appeal allowed on human rights grounds – Article 8.

Signed Date 10 July 2014

Deputy Upper Tribunal Judge Peart